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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120710231-2473-01]

RIN 0648-BC33

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Atlantic Sea Scallop Fishery; Proposed Emergency Action

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to partially exempt the scallop fishery from fishing year 2012-related Georges Bank yellowtail flounder accountability measures. This action is being proposed to respond to a request for emergency rulemaking from the New England Fishery Management Council (Council). This proposed action is intended to provide an explanation of how the partial exemption would function; outline how the proposed action satisfies Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) emergency rulemaking criteria; and to solicit public input on the proposed exemption.

DATES: Comments must be received on or before [insert date 30 days after the date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on this document, identified by “NOAA-NMFS-2012-0179,” by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal [www.regulations.gov](http://www.regulations.gov). To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA-NMFS-2012-0179 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.
- Mail: Submit written comments to John K. Bullard, Regional Administrator, 55 Great Republic Drive, Gloucester, MA 01930.
- Fax (978) 281-9135.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the draft environmental assessment (EA) prepared for this action by NMFS are available from John K. Bullard, Regional Administrator, 55 Great Republic Drive, Gloucester, MA 01930. The EA is accessible via the Internet at <http://www.nero.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Michael Ruccio, Fishery Policy Analyst, phone: 978-281-9104.

## SUPPLEMENTARY INFORMATION:

### Background

In New England fisheries, catch limits are developed by the Council and recommended for implementation through rulemaking by NMFS. When established catch limits are exceeded, various accountability measures (AMs) are triggered. These AMs modify subsequent years' fishing opportunities to prevent future overages so that overfishing does not occur. Catch limits and AMs are both requirements of the Magnuson-Stevens Act.

Georges Bank (GB) yellowtail flounder is found on both sides of the international maritime border between the United States and Canada, the Hague Line, and is a U.S./Canada shared stock. The Council's process for developing the catch limit for GB yellowtail flounder is done in conjunction with Canada through a formal understanding between both countries (i.e., the U.S./Canada Resource Sharing Understanding, commonly referred to as "the Understanding"). This Understanding provides a process for collaborative scientific stock assessments, as well as a management allocation framework for distributing catch allowances to both countries.

The 2012 fishing year total catch limit for GB yellowtail flounder, recommended by the Council and implemented by NMFS, for the U.S. fishery is 547.8 metric tons (mt). Within this catch limit, the groundfish fishery was allocated an individual fishery catch limit, called the sub-annual catch limit (ACL), of 217.7 mt; the scallop fishery's initial limit was 307.5 mt; and 22.6 mt were provided for the other sub-component fisheries. The other sub-component fisheries are those not targeting either groundfish or scallops but that incidentally catch GB yellowtail flounder, such as the summer flounder trawl fishery.

During the April 25, 2012, Council meeting in Mystic, CT, members of the groundfish fishing industry expressed concern to the Council that the 2012 groundfish GB yellowtail flounder sub-ACL of 217.7 mt was too low. The concerned parties stated that the catch limit was so low that it would effectively prevent fishermen from targeting more abundant, healthy stocks such as haddock. Given this concern and indications that the scallop fishery sub-ACL for GB yellowtail flounder may be higher than needed by the scallop fishery in light of more current catch projections information, the Council requested that NMFS create a GB yellowtail flounder working group to explore the possibilities of increasing the amount of GB yellowtail sub-ACL allocated to the groundfish fishery. The request suggested that the working group include members from the Transboundary Management Guidance Committee (TMGC), Council Groundfish and Scallop Committees, and NMFS and Council staff. The Council requested that the working group revisit the FY 2012 sub-ACLs for the scallop and groundfish fisheries based on new information suggesting that the projections of GB yellowtail flounder catch in the scallop fishery were much higher than needed, and to consider modification of the U.S. and Canadian shares of GB yellowtail flounder established through the Understanding.

In response to this request, NMFS formed a working group consistent with the Council's request. NMFS also invited the fishing industry, non-governmental organization representatives, and the general public to the working group meetings. The working group held teleconferences on May 11, 2012, and May 18, 2012, a 1-day workshop in New Bedford, MA, on May 23, 2012, and teleconferences on May 31, 2012, and June 15, 2012. During these five meetings, the working group discussed a range of short-term and long-term measures for GB yellowtail flounder management, in addition to the Council requests made at its April 2012 meeting. The working group recognized that the most effective short-term tool to address the Council's request

was to utilize existing regulatory authority to revise sub-ACLs allocated to the scallop and groundfish fisheries for GB yellowtail flounder. To determine the feasibility and magnitude of potential revisions of the scallop and groundfish sub-ACLs, the working group asked for updated projections by NMFS's Northeast Fisheries Science Center (NEFSC) of expected catch of GB yellowtail flounder in FY 2012 by the scallop fishery. In addition, the working group discussed the concept of exempting the scallop fishery from any scallop fishery sub-ACL revision AM if the sub-ACLs were revised based on the updated information.

In addition to the working group meetings, the Council's Groundfish and Scallop Committees convened jointly on June 18, 2012, in Portland, ME, to discuss the Council's original requests and review the discussions from the working group. On that same date, the NEFSC provided revised projections of GB yellowtail flounder catch by the scallop fishery ranging from 47.6 mt to 174.3 mt, with a median projection of 105.2 mt. Using these new projections, the Joint Committee recommended to the Council that it request that NMFS use its current regulatory authority to reduce the scallop GB yellowtail flounder sub-ACL to 90 percent of the 174.3 mt high-end estimate provide by NEFSC (i.e., 156.9 mt), and increase the groundfish GB yellowtail flounder sub-ACL by the amount of this reduction. The recommendation was to decrease the scallop sub-ACL from 307.5 mt to 156.9 mt and increase the groundfish sub-ACL from 217.7 mt to 368.3 mt. The Joint Committee also recommended that the Council request emergency action to relieve the scallop fishery from any fishing year 2012 AM triggered by GB yellowtail flounder catch less than 307.5 mt that would otherwise be required under the existing regulations. At its June Council meeting, the Council adopted the Joint Committee recommendations and forwarded them to NMFS for evaluation and implementation.

On July 16, 2012, NMFS used its existing authority to revise the fishing year 2012 GB yellowtail flounder sub-ACLs for the groundfish and scallop fisheries, consistent with the Council's request. The other sub-component sub-ACL was not revised, and remains 22.6 mt.

Table 1. Initial and revised FY 2012 GB yellowtail flounder catch limits in metric tons.

	<b>Total ACL</b>	<b>Groundfish Fishery sub- ACL</b>	<b>Scallop Fishery sub- ACL</b>	<b>Other sub-component sub- ACL</b>
Initial	547.8	217.7	307.5	22.6
Revised	547.8	368.3	156.9	22.6

This adjustment increased the groundfish sub-ACL to 368.3 mt and decreased the scallop sub-ACL to 156.9 mt. NMFS announced, in conjunction with the sub-ACL revision, its intention to propose the Council-recommended AM exemption for the scallop fishery.

#### Proposed Action

The current regulatory language allows NMFS to evaluate GB yellowtail flounder catch in the scallop fishery relative to the revised sub-ACL of 156.9 mt. Thus, if no action is taken, the scallop fishery could be subject to an AM if the FY 2012 catch of GB yellowtail flounder in the scallop fishery exceeds 156.9 mt. The AM for the scallop fishery can become necessary under two scenarios: If the scallop fishery exceeds its GB yellowtail flounder sub-ACL by more than 50 percent, or if the scallop sub-ACL is exceeded by 1 or more pounds and the total GB yellowtail flounder fishery ACL is also exceeded by 1 or more pounds. The AM for the scallop fishery is found in 50 CFR Section 648.64. Generally, the scallop fishery AM for GB yellowtail flounder implements time and area closures based on the magnitude of the overage to decrease fishery access in a subsequent fishing year.

This proposed emergency action, requested by the Council, would exempt the Atlantic sea scallop fishery from any AM specified for catch of GB yellowtail flounder exceeding the revised scallop fishery sub-ACL of 156.9 mt up to the initial sub-ACL level of 307.5 mt. Any

GB yellowtail flounder overage in the scallop fishery above 307.5 mt would result in an AM being implemented. The following table summarizes the actions proposed to be implemented by NMFS through this emergency rulemaking.

Table 2. Proposed FY 2012 scallop fishery GB yellowtail flounder catch and accountability actions.

Yellowtail catch in the scallop fishery	Description	Accountability Action
less than 156.9 mt	Below revised sub-ACL	None
greater than 156.9 mt but below 307.5 mt	Exceeds revised sub-ACL (post transfer); below initial sub-ACL	None under proposed exemption
greater than 307.5 mt	Exceeds initial sub-ACL	Implemented, as required by regulation

Accountability at the fishery level remains unchanged by this proposed action. Any overage of the 547.8-mt fishery level ACL is to be repaid pound-for-pound in a subsequent fishing year. Overages at the fishery level ACL could be the result of excess taken by the groundfish, scallop, other sub-component fisheries, or some combination of those three.

#### Authority for Proposed Action, Including Emergency Action Justification

Section 305 of the Magnuson-Stevens Act authorizes the Secretary of Commerce (Secretary) to act if: (1) The Secretary finds that an emergency involving a fishery exists; (2) the Secretary finds that interim measures are needed to reduce overfishing in any fishery; or (3) if the Council finds one of those factors exists and requests that the Secretary act. Where such circumstances exist, the Secretary may promulgate emergency rules or interim measures “to address the emergency or overfishing.” (16 U.S.C. 1855(c)(1) and (2)). The Secretary has delegated this authority to NMFS. Further, NMFS has issued guidance defining when “an emergency” involving a fishery exists (62 FR 44421; August 21, 1997). This guidance defines an emergency as a situation that (1) arose from recent, unforeseen events; (2) presents a serious conservation problem in the fishery; and (3) can be addressed through interim emergency regulations for which the immediate benefits outweigh the value of advance notice, public

comment, and the deliberative consideration of the impacts on participants to the same extent as would be expected under the formal rulemaking process. NMFS policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone. Under the statute and guidance, the rationale for issuing these emergency and interim regulations is as follows:

First, the magnitude of the recently revised projections of GB yellowtail flounder catch by the scallop fishery, coupled with the timing of and need for this revised projection, so relatively early in the scallop and groundfish FYs, meet the threshold criterion that the need for the emergency arises from recent, unforeseen events. The request by the Council to revise the groundfish and scallop sub-ACLs early in the fishing year, based on projections for Georges Bank yellowtail flounder catch in the scallop fishery, was not foreseeable. While the authority for making such revisions was granted to NMFS through Framework Adjustment 47 to the NE Multispecies FMP, the revision process was designed with the expectation that revisions to the sub-ACLs would occur late in the fishing season when current fishing year catch data are available for analysis. Second, given the magnitude of the reduction in the scallop sub-ACL at this point in the scallop fishery, and the inherent uncertainties in making such projections, which creates a much lower threshold for triggering AMs, it is necessary, to ensure fairness and equity in the consequences of this revision, that the scallop fishery not be unduly penalized for exceeding a sub-ACL revised midway through the fishing year. The Council's request to provide a partial exemption from the Georges Bank yellowtail flounder AM to the scallop fishery was also unforeseen. There are no regulatory provisions that provide any amount of exemption from AMs following revision of the sub-ACLs; thus, the Council's request was



unexpected but understandable given the desire to maintain equitability between fisheries. The emergency will also serve to enhance consistency with National Standard 4 of the Magnuson-Stevens Act regarding requirements for fishing measures to be fair and equitable, and National Standard 8 regarding the requirement to minimize adverse economic impacts. The third criterion relating to justifying an emergency without prior public comment is not relevant because this emergency rule provides prior notice and opportunity for public comment. It should be noted, however, that the Council process would likely be unable to develop and implement the proposed action on a timeframe that would provide the partial exemption. For this reason, emergency action provides a timely response to ensure adverse economic impacts are avoided.

It is important to understand that the revision of sub-ACLs, while contemplated within the authority provided by Framework Adjustment 47 to the NE Multispecies FMP, occurred early within the fishing year because of new projections of scallop catch based on updated 2011 observer and dealer data. The regulatory language for the revision process references examining catch data by January 15 of the fishing year. Framework 47 presumably envisioned an examination of 6-8 months of current fishing year catch data before adjusting the sub-ACLs, as necessary, with any revision based on the best available catch projection information for GB yellowtail flounder catch in the scallop fishery. This year, the sub-ACL adjustment was completed using the best available catch projection information, rather than 6-8 months of actual catch data in the scallop fishery. This means that there are more uncertainties associated with how accurate the actual catch will be over the course of the fishing year than there may have been if this revision was made much later in the fishing year. The projection indicates that the scallop fishery is expected to catch no less than 47.6 mt (low-end estimate) and no more than 174.3 mt (high-end estimate) of GB yellowtail flounder in the 2012 fishing year. The revised

sub-ACLs are based on the high end of this projected range, which helps mitigate some of the uncertainties about the potential scallop harvest by basing the revisions on the projected “worst case scenario” for catch. Nevertheless, as more fully explained below, the inherent uncertainties associated with revising the scallop fishery sub-ACL for GB yellowtail flounder this early in the fishing year is a major justification to adjust the triggering of AMs for the scallop fishery.

The scallop fishery is operating in a somewhat different manner this fishing year. The GB access areas are operating without a yellowtail flounder closure cap for the first time. The scallop fleet continues to use a proactive, near real-time system for avoiding yellowtail flounder; however, the negative implications for exceeding the catch projections and ultimately the sub-ACL are substantial. Although the scallop sub-ACL reflects a high-end projection of what is expected to be caught in fishing year 2012, the early adjustment of the sub-ACLs paired with the different operational constraints in the scallop fishery this year increase the uncertainty associated with the sub-ACL adjustment based on catch projections. Given these uncertainties, the scallop fleet may have operated differently in the first part of the fishing year had they known the sub-ACL would be so drastically modified. In order to ensure that both fleets may operate reasonably within the constraints of the total GB yellowtail flounder ACL, NMFS proposes to exempt the scallop fishery from accountability below the initial 307.5 mt level, as previously stated. This is necessary to ensure the scallop fishery is not penalized by the unanticipated early-season, large revision of the sub-ACLs, which occurred after the start of the fishing year.

#### Classification

The Administrator, Northeast Region, NMFS, determined that this emergency proposed rule is necessary for the conservation and management of the GB yellowtail flounder fishery and

that it is consistent with the Magnuson-Stevens Act and other applicable laws, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed emergency rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

In 2010 there were 347 permitted scallop vessels in the limited access category and 730 in the general category. Mean annual gross sales for vessels in the limited access category are just over \$1 million, while for the general category this figure is slightly under \$80K.

The small business size standard threshold for both shell and finfish fishing is gross sales above \$4.0 million annually (13 CFR Section 121.201). Below this threshold, the SBA considers fishing businesses to be small entities. No individual vessel was estimated to gross more than \$3 million in any one fishing year from 1994 to 2010; therefore, all of the vessels in the scallop fishery are considered small business entities.

This action, if implemented, effectively changes the point at which GB yellowtail flounder accountability measures are triggered for the scallop fishery. The AM is required by both the Scallop FMP and the Magnuson-Stevens Act, and must minimize the impact on small regulated entities to the extent practicable, while ensuring compliance with the regulatory and statutory requirements for fishery accountability.

Previous analysis conducted for Framework Adjustment 47 to the NE Multispecies FMP, which is available on the Council's website (<http://www.nefmc.org/nemulti/index.html>),

concluded that less than 1 percent of total scallop fishery revenues came from areas potentially affected by the GB yellowtail flounder AM. Furthermore, the analysis concluded that a significant effect on profitability is likely to be minimal if the scallop fishery AM were triggered. Because all participating scallop vessels are deemed to be small regulated entities, there would be no disproportionate impacts.

As compared to the status quo, the proposed action reduces the likelihood that the scallop fishery GB yellowtail flounder AM will be triggered. Under the proposed action, the scallop fishery AM would be implemented under the following circumstances: 1) If the total ACL is not exceeded but the scallop fishery catch of GB yellowtail flounder exceeded 461.3 mt (i.e., exceeded 307.5 mt by 50 percent); or 2) if the total GB yellowtail flounder ACL is exceeded and the scallop fishery catch exceeds 307.5 mt. By comparison, the status quo would trigger the AM if: 1) The total GB yellowtail flounder ACL is not exceeded but the scallop fishery catch exceeds 235.0 mt (i.e., 50 percent above the 156.7 mt revised sub-ACL); or if the total fishery ACL is exceeded and the revised scallop sub-ACL of 156.7 is exceeded.

The potential impact to the groundfish fishery is the same under both the status quo and the proposed action. If the total fishery ACL is exceeded, a pound-for-pound repayment of the overage is required in a subsequent fishing year. The overage repayment provision is required by the NE Multispecies FMP, consistent with the Magnuson-Stevens Act and the U.S./Canada Resource Sharing Understanding.

The proposed action will reduce the likelihood that the scallop fishery AM may be triggered. The prior analysis concluded that the potential economic impacts of the scallop fishery AM, if triggered, are unlikely to be significant to the small entities of the scallop fishery. The potential impacts of the proposed action to the groundfish are the same as the status quo and,

if necessary, minimized to the extent practicable consistent with the applicable requirements for the fishery. Because the proposed rule would reduce the likelihood of triggering the scallop fishery AM and would not increase the likelihood of adverse impacts to the groundfish fishery, it would not have a significant impact on a substantial number of small entities. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: September 25, 2012

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Alan D. Risenhoover,

Director, Office of Sustainable Fisheries,

performing the functions and duties of the

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is proposed to be amended as follows:

**PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES**

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 648.90,

a. Suspend paragraph (a)(5)(iv); and

b. Add new paragraphs (a)(5)(v)(A) through (D) to read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

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(a)\* \* \*

(5)\* \* \*

(v) AMs if the sub-ACL for the Atlantic sea scallop fishery is exceeded. At the end of the Atlantic sea scallop fishing year, NMFS shall evaluate Atlantic sea scallop fishery catch to determine overages.

(A) For stocks with established sub-ACLs, the determination will be made whether the Atlantic sea scallop fishery catch has exceeded the fishery sub-ACL.

(B) For fishing year 2012, the Georges Bank yellowtail flounder sub-ACL does not apply. Rather, the determination will be to evaluate if the Atlantic sea scallop fishery catch of Georges Bank yellowtail flounder exceeds 307.5 mt.

(C) On January 15, or when information is available to make an accurate projection, NMFS will also determine whether the overall ACL for each stock allocated to the Atlantic sea scallop fishery has been exceeded. When evaluating whether the overall ACL has been exceeded, NMFS will add the maximum carryover available to sectors, as specified at § 648.87(b)(1)(i)(C), to the estimate of total catch for the pertinent stock.

(D) If catch by scallop vessels exceeds the pertinent sub-ACL specified in paragraph (a)(4)(iii)(C) of this section, or 307.5 mt for Georges Bank yellowtail flounder, by 50 percent or more, or if scallop catch exceeds the scallop fishery sub-ACL, or 307.5 mt for Georges Bank yellowtail flounder, and the overall ACL for that stock is also exceeded, then the applicable

scallop fishery AM shall take effect, as specified in § 648.64 of the Atlantic sea scallop regulations.

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